IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1812 OF 1987

Gladhurst Coop.Housing Society Ltd. .. Petitioners

Versus

Dr.(Mrs) V.B.Shah & Anr. .. Respondents

WITH

FIRST APPEAL NO.129 OF 2003

Milan P. Shah & Ors. .. Appellants

Versus

M/s.D.S.Raheja & Co. & Ors. .. Respondents

CORAM : S.C.DHARMADHIKARI, J.

DATE : 5th May 2006.

ORAL JUDGEMENT:-

. These matters are directed to be heard together as they involve common question of law

and fact. Accordingly, they were heard together and being disposed of by this common Judgment.

2. W.P.1812 of 1987 invokes this Court's jurisdiction under Article 227 of Constitution of India to challenge a judgement and order of Maharashtra State Coop.Appellate Court dated 19th February 1987 in Appeal No.468 and 469 of 1986. A copy of this judgement and order is annexed as Annexure 'K' to the petition.

3. The first appeal is directed against a judgement and decree of City Civil Court, in L.C.Suit No.3005 of 1985. This judgement and order is dated 24th April/ 2nd May 2002.

4. Petitioner in Writ Petition is also appellant in the first appeal. The petitioner is appellant No.9. It was original defendant No.5 in the above civil suit. It would be convenient to refer to the facts in the first appeal for

appreciating rival contentions.

5. The above suit was filed by the original plaintiff (Appellant Nos. 1 to 8) against M/s.D.Raheja and Company, Mr.B.M.Shah and Dr.Mrs.Vibha B.Shah as also Municipal Corporation and Gladhurst Cooperative Housing Society Ltd. (hereinafter referred to as the Society). Prayer in the plaint is that City Civil Court should issue a decree and order of permanent injunction restraining defendants, their servants and/or agents or any person or persons claiming by or under or through them from undertaking, carrying out or proceeding with the work of any changes in the original plan and designs of the building and/or in the external appearance of elevation and/or flat Nos. 1 and 2. In substance, the prayer is that the Building Gladhurst situate at P.M.Road, Santacruz (W), Mumbai 400 054 in which flat Nos. 1 and 2 are situate should not be used for any purpose other than private housing. A

mandatory injunction is sought against defendants to the suit to restore the said flats to their original condition and to remove, alter or demolish the changes unauthorisedly effected in the said flats. There is a prayer for mandatory order and direction directing Municipal Corporation to revoke, cancel and withdraw the permission, if any, granted to defendant Nos. 2 and 3 for change of user of the said flats for any other purpose than residential one.

6. Parties to the appeal shall be referred to by their original nomenclature. The plaintiffs are purchasers of residential flats in the building Gladhurst. By diverse agreements for sale entered into by them with the first defendant builder, they purchased flats for residential use and occupation. According to them, the agreements are covered by the provisions of Maharashtra Ownership Flats (Regulation of the permission of construction,

sell, management and transfer) Act, 1963 (for short Ownership Flats Act.)

7. After referring to the agreement and more particularly clause 12 thereof, which provides that the flat holders shall not use flats for any purpose other than residence, it is contended that all purchasers agreed to purchase their respective flats on solemn undertaking and on the basis that no non residential user of any of the flats in the building will be permissible. It was pointed out that:-

. The defendant Nos. 2 and 3 have agreed to purchase from 1st defendant Flat Nos. 1 and 2 in the B Wing on the ground floor of the said building. Around the end of March, 1985 the plaintiff and other members of the said committee learnt that the defendant Nos. 2 and 3 proposed to use the said flats exclusively for a non-residential purpose by starting their Nursing

Home, Dispensary, polyclinic, etc. in the said premises and proposed to carry out additions and alterations within and outside the said flats in diverse ways. Thereupon, the said Committee took up the matter with the 1st defendants vide its letter dated 27th March 1985 and sought from them clarifications and explanations on the said issue.

. On 7th April 1985 a General Body meeting of the said flat purchasers was held at which defendant Nos.2 and 3 were also present. At the said meeting, the issue of the proposed change of use of the said flat No.1 and 2 by defendant Nos. 1 and 2 was discussed, when defendant No.2 in terms agreed that he and his wife would not start a Nursing Home in the said premises. However on 22nd April 1985 the defendant Nos. 2 and 3 undertook and carried out various extensive alterations and changes in the said flat such as removal of partition walls, changing location and

size of door and windows in the said flat and/or closing the originally provided doors and windows and opening new ones in place and stead thereof. Not content with the said internal changes unauthorisedly carried out by them, they proceeded to carry out substantial changes in the structure of the said building so as to destroy, damage or disturb the external elevation and uniformity of the said building as enumerated below:-

(i) In place of the windows as originally provided in the eastern wall of the living room of Flat No.2, the defendant Nos. 2 and 3 provided an entrance door and a widow by demolishing the said wall and shifting the position of the said window. The alteration is in the structure of the building for which none of the flat purchasers including the plaintiffs ever consented.

(ii) A small window in the Eastern wall of the living room of Flat No.1 was removed and replaced by a far bigger window by demolishing part of the said wall which resulted in the change and alteration in the plans and specifications of the said building.

(iii) Stilted portion marked by letter "C" on Exh.A to the plaint constitutes common area not sold or saleable to any individual flat purchaser. The defendant nos. 2 & 3 demolished the eastern wall of the said stilted portion and fixed a door therein with a view to providing a direct access to flat No.1 from the open space, around the said property. In the process the said defendants destroyed part of the garden in the open space adjoining the said portion. This change

is indicated by letter "D" on Exh.A to the plaint and clearly constitutes change and alterations in the said building.

(iv) In the southern wall of the open garage shown by letter E on Exh.A the defendant Nos. 2 and 3 fixed a door so as to include the said open garage in the said flat No.1. The said newly opened door is shown by letter E on the Exh.A. Defendant Nos. 2 and 3 proposed to make use of the said open garage meant exclusively for parking cars, as a waiting room for the patients of defendant No.3.

The defendant Nos. 2 and 3 hastened to carry out the said work with utmost speed on a holiday with a view to forstalling the action which the other flat purchasers or the committee would take against them. They carried out the said work

without the consent of the committee or the other flat purchasers and/or without regard to safety, security and/or their comfort or convenience.

8. In the plaint, it is thereafter alleged that when the committee sought clarification from first defendant, it denied having permitted any change of user. They pointed out that the stilted portion indicated by letter "C" at Exh.A to the plaint was not sold by it to defendant Nos. 2 and 3. They assured the Committee to look into the matter and suitably advice defendant Nos. 2 and 3 to desist from using the flat for non residential purpose without obtaining permission and consent of all flat purchasers. The impression given, according to plaintiffs, by defendant No.1 is that consent with regard to the changes also would be sought by the defendant Nos. 2 and 3. The plaint proceeds to allege that defendant No.1 indeed talked with defendant Nos. 2 and 3 and advised

them to stop their activities. The work was stopped since 25th April 1985, leaving the plaintiffs to believe that defendant Nos. 2 and 3 have realised their mistake. However, activities recommenced and that is how the suit came to be filed claiming aforesaid reliefs.

9. Reliance was placed in the plaint on the fact that the activities have not been permitted by the ad-hoc committee of society. The builder also having denied granting any permission or approval, the activities are not in accordance with law. That apart, section 7(1) of the ownership Act does not permit any alterations in the structure without prior consent of the plaintiffs. The activities are also contrary to the D.C. Rules then prevailing for the city. The plaint refers to several rules and then proceeds to set out the nature of the reliefs sought in the plaint.

10. It appears from the record that the first defendant, in interlocutory proceedings in the suit, filed an affidavit and took a specific stand that flat Nos. B-1 and B-2 on ground floor of the building were purchased by defendant Nos. 2 and 3 on the terms and conditions contained in the agreement for sale dated 10th January 1985. Under the agreement for sale, every flat holder has to use the flat as private residence and one parking space is provided for parking vehicle. By a separate letter, defendant Nos. 2 and 3 requested defendant No.1 to allow them to use the said flat as a nursing home and assured defendant No.1 that other flat purchasers in the building will have no objection for such use by them. Defendant Nos. 2 and 3 also stated that they will manage with Municipal Corporation. On such representation and assurance, defendant Nos. 2 and 3 obtained no objection from defendant No.1 - Builder. The said letter clearly stated that if, other flat purchasers have no objection, then,

the first defendant also has no objection to the change of user by defendant Nos. 2 and 3. Defendant No.1 pointed out that defendant Nos. 2 and 3 obtained their permission for three door openings in the said two flats. However, other flat purchasers did not give no objection for this act and vehemently opposed use of the flat for the purpose of nursing home. The builder has blamed defendant Nos. 2 and 3 for taking advantage of the cooperation extended and under the garb of the same, extensive repairs have been carried out by defendant Nos. 2 and 3 and alterations and changes of permanent nature have been made. The builder confirmed that the members of the ad hoc committee of the flat purchasers approached it and objected defendant Nos. 2 and 3 using the flats for the purpose of nursing home. An attempt was made to contact defendant Nos. 2 and 3. The assurances given by defendant No.3 have been noted in this reply so also the reply confirms the objections of the

ad-hoc committee in the meeting and the assurances given therein by defendant Nos.2 and 3 not to open nursing home and restrict the user of the part of the flats for consultation.

11. Defendant Nos. 2 and 3 filed written statements and while denying all the allegations averred that the flats have been purchased by them from defendant No.1. They denied the authority of the ad-hoc committee. The written statement having been drafted by party in person, it does not make a proper reading and some times there are assertions coupled with denials. The denials are of the statements in the meeting. It is contended that the door openings in the flat are legal and permitted. There is permission by the Municipal Corporation for use of nursing home. It is contended that there is permission to enclose a portion marked "C" by collapsible gate. Reliance is placed on permissions given by B.M.C. Thus, the suit according to defendant

Nos. 2 and 3 is not maintainable and deserves to be dismissed. The written statement is annexed to the compilation tendered during the course of submissions at page 20 to 30.

12. The stand of Municipal Corporation appears to be that, the defendant Nos. 2 and 3 through their Architect Patil and Associates made an application by the letter dated 24th January 1985 for the change of user from residential to Nursing Home, dispensary for Flat No.B-1 and B-2 of ground floor in the building along with no objection issued by the defendant No.1. as also ground floor plan indicating the proposed change of user in Flat No.B-1 and B-2 and requested to grant the said permission, after considering the defendant No.2 and 3's application for the proposed change of user from residential to nursing home. The Corporation approved the said application for change of user on 26th February 1985, on certain terms and conditions. According

to the said approval the Corporation issued a letter dated 5th March 1985 informing Architect of defendant Nos. 2 and 3 that there is no objection to change the user of flat No.B-1 as detailed in the accompanying plan subject to the conditions mentioned therein. In reply to the said approval letter dated 5th March 1985, the Corporation received a letter dated 24th May 1985 from the Architect of defendant Nos. 2 and 3 stating therein that the work for the change of user as shown on the plan approved has been carried out under his supervision and the said work commenced on 5th April 1985 and the same was completed on 23rd April 1985. Thereafter, completion certificate was requested for by defendant Nos. 2 and 3 under section 353(A) of the Corporation's Act. According to the Corporation, it had already approved the plans according to the provisions of the Act, building bye-laws and D.C.Rules on 5th March 1985 and as per the letter dated 24th May 1985 defendant Nos.

2 and 3 have carried out the work. According to Corporation, plaintiff's suit has, therefore, become infructuous and the same be dismissed. According to Corporation, on 8th May 1985 it received an application for change of user in flat No.B-2 for which the Corporation approved the plans on 28th May 1985 informing the Architect of defendant Nos. 2 and 3 that there is no objection to change of user of the flat No.B-2 as detailed in the accompanying plans subject to the conditions of the approval letter issued by Corporation. According to Corporation plans for change of user from residential to nursing home were approved as per building bye-laws and D.C.Rules and provisions of law. Before sanctioning the plan for flat No.B-2 the plaintiff rushed to this Court and filed the present suit for obtaining mandatory injunction order to revoke, cancel and withdraw the permission granted by defendant Nos. 2 and 3. Defendant Nos. 2 and 3 have carried out the work

as per the approved plans by Corporation. Under the circumstances, the suit has become infructuous. Therefore, the plaintiff is not entitled to any relief in terms of prayer of suit. Thus, their stand is that the suit is misconceived and in any event rendered infructuous.

13. As far as the writ petition is concerned, the same arises out of appellate proceedings before the Cooperative Appellate Court. These appeals were directed against the judgement and award in two cases filed by the Society in Coop.Court bearing Case Nos.1005 and 1006 of 1985. First case was filed to claim declaration that respondent Nos. 1 and 2 (original appellants) have no right to retain Flat No.B-2 for non residential use and they be directed to demolish illegal additions, alterations and to restore the flat to its original condition. They should also be directed to reinstate the garden

adjoining the flat and remove encroachment on the stilts and other portions of the society. In other words a restraint order be placed on their using or converting the flat for nursing home or maternity home or hospital or clinic or dispensary.

14. The second case 1006 of 1986 also instituted by the society as disputants, claims similar declaration with regard to Flat No.B-1.

15. The written statement of original defendant Nos. 2 and 3 who were the only opponent in these coop.cases, was filed and the assertions therein are more or less same as that of the written statement in the suit. The case is that the flats have been purchased for the purpose of use as nursing home and that other purchasers were aware of the same.

16. The above cases/ disputes was placed

before the Coop.Court and by a common judgement rendered therein, the following award was made:-

> "1. Opponents are hereby declared as not entitled to use premises for nursing home purposes in disputant society's building and opponents servants and agents are hereby restrained from using flat no. B-1 and B-2 in disputant society's building, Gladhurst for Nursing Home purposes".

17. Aggrieved by this judgement and award, defendant Nos. 2 and 3 who were original opponents preferred appeals to the Coop.Appellate Court and Appeal Nos. 468 and 469 of 1989 were allowed by the Coop.Appellate Court by the judgement and order dated 19th February 1987. In other words, judgement and order of the Coop.Court (Trial Court) is set aside. The common judgement of the appellate court in the

above appeals is subject matter of challenge in the present petition.

18. As far as civil suit is concerned, the same, after pleadings were complete, was taken up for hearing and final disposal. The issues were framed and issues 1 and 2 are relevant and they were answered thus:-

> (1) Whether the permission of change of user granted by the Defendant No.4 in favour of Defendant Nos. 2 and 3 was granted in violation of the D.C.Regulation and the provisions under the B.M.C. Act:- IN THE NEGATIVE.
>
> (2) Do the plaintiffs prove that for change of user from residential to commercial their permission is essential under the terms and conditions of Deed of Agreement in between the plaintiff/ flat

purchaser and the builder/ Developer Defendant No.1.: IN THE NEGATIVE

19. The evidence-in-chief of plaintiff No.13 (V.V.Kamat) was recorded on affidavit, whereas defendant No.2 who is appearing before me in person stepped into witness box. As far as Corporation is concerned, on its behalf, defendant No.4 stepped into witness box. He was cross examined by the appellants herein. These witnesses have been cross-examined by parties.

20. The trial court, by an exhaustive judgement has held that the appellants are not entitled to succeed in the light of its findings on issue Nos. 1 and 2. The suit was, therefore, dismissed with costs. The judgement and decree of the trial court to the above effect is dated 24th April 2002.

21. Since Issue Nos. 1 and 2 in the suit and in the case before Coop.Court are identical so also parties being common to both proceedings, writ petition and first appeal were directed to be decided together.

22. Mr.R.V.Pai, learned Counsel appearing for Society has urged that the controversy in coop. Court case as well as the suit stands fully covered by a decision of the Supreme Court in the case of Dadar Avanti Coop.Hsg. Vs. M.C.G.B. reported in 1996 (2) S.C.C. 695. He submits that identical controversy was before the Supreme Court and the Supreme Court has observed that at the relevant time, the D.C.Rules for Greater Bombay did not permit any non residential user in residential zone and/or premises. Once this is the conclusion in law, then both, the judgement of the Coop.Appellate Court as well as Trial Court are patently unsustainable, erroneous and deserve to be set aside. In his submission,

before the City Civil Court, during the course of the proceedings, the judgement of the Supreme Court (supra) was available. He submits that despite clear pronouncement of law therein, the trial court has unnecessary gone into completely extraneous and irrelevant issues. In his submission, there is no scope of interpretation of relevant D.C.Rules. On the other hand, the broad categorisation by Supreme Court with regard to user of the premises being residential and non residential, there cannot be any justification for going into the aspect as to whether Nursing home is covered by the term "clinics", as used in D.C.Regulations. He submits that in the light of the pronouncement with regard to identical regulations by the Supreme Court, it is clear that D.C. Regulations in question does not cover nursing home. Therefore, the issue as to whether it is clinic or not does not survive for consideration.

23. Mr.Pai has invited my attention to the judgement of the Civil Court in the suit and has challenged the findings of the learned Judge to the effect that the term "clinic" as found in Rule 7(iii) of the D.C.Rules for Mumbai excludes nursing home and the terms clinic and nursing home are synonyms of each other.

24. He submits that reliance by the trial court on the judgement/order delivered in Appeal From Order No.662 of 1986 dated 19th September 1986 by this Court is misplaced. He submits that the deletion of the word "Group Medical Centre" from the D.C.Rule 7(iii) and further aspect as to whether the same would cover nursing home or not is something which is not surviving after the Supreme Court decision. The Supreme Court decision is clear inasmuch as prior to their amendment in 1991, the D.C. Rules did not contemplate any non residential user.

25. Mr.Pai has submitted that admittedly there is no provision enabling the non residential user on the ground floor in this case. He submits that as far as the non registration of the society and the possession and user of the defendant Nos. 2 and 3 is concerned, the case would be governed by clause 12 of the agreement for sale of the flats in question. Both sides viz., builder as well as defendant Nos. 2 and 3 have submitted to clause 12. It is prescribing restrictions upon user and the said clause cannot be held to be void. He submits that the finding of the trial court is erroneous. Mr.Pai has invited my attention to the Civil Court observation on validity of clause 12. He submits that it is erroneous to contend that prohibition contemplated by the clause is contrary to the provisions contained in the B.M.C. Act, M.R.T.P. Act and D.C. Rules, then in force. He submits that such clauses being ab initio void and incapable of being acted upon is

a finding rendered by the civil court, contrary to the statutory provisions as also the materials placed on record. If the clause is void ab initio and not binding upon parties to the agreement, then, it was not necessary for the civil court to scrutinise, so called concessions granted by the builder to defendant Nos. 2 and 3. He submits that the civil court has ignored the affidavit filed by the builder. The statements therein have remained uncontroverted. In any event, if the clause cannot be acted upon in the light of the D.C. Rules, then, the judgement of Supreme Court interpreting the D.C. Rules in question was binding upon the civil court and such binding decision of the Highest Court of the land should not have been brushed aside.

26. Mr.Pai was at pains to emphasise the fact that in a housing society, a member cannot be permitted to use the premises meant for residence

for non residential purpose in contravention of the provisions of law, for that would go against the very spirit of Cooperative movement. The flat purchasers in a building which is meant for residence have got together and formed a society. Its by-laws containing a prohibition with regard to non residential user is binding upon the member. He submits that Bye-law is in the nature of a contract and there is no challenge to bye-laws. When the Bye-laws prohibit such user, then the courts below ought to have upheld the contentions of the society and restrained defendant Nos. 2 and 3 from continuing with the use of the flats in question for non residential purpose or a nursing home.

27. The last submission of Mr.Pai is that looked at from any angle, the action of defendant Nos. 2 and 3 is prohibited. Their right to practice their profession is always subject to reasonable restrictions and in residential

premises, if non residential user is prohibited and such prohibition is in public interest, the defendant Nos. 2 and 3 cannot be heard to contend that they may be allowed to continue their activity on the ground that they purchased the flats specifically for such user.

28. In addition to the judgement of the Supreme Court (supra), Mr.Pai relies upon the following decision:-

> A.I.R. 2002 S.C. 1598 (Director of Settlements A.P. Vs. M.R.Apparao & Ors.)

29. Defendant No.2 to the suit and opponent No.1 to the dispute Mr.Bhupendra Shah appears in person, on behalf of himself as well as his wife, who is medical practitioner. Mr.Shah submits that the submissions of Mr.Pai do not deserve to be accepted. He placed strong reliance upon D.C.

Rules prevailing at the relevant time and a notification dated 28th February 1991 amending the D.C. Rules for Mumbai. He submits that notification being very clear inasmuch as what is allowed by the D.C. Rules till such time as the amendment was proposed thereto is specifically saved by the notification and the amended D.C. Rules, as well. In other words, his submission is that the purpose of amending the D.C. Rules is not to take away the facility, concession and permission granted by the earlier D.C. Regulations and even after the same stood amended, insofar as, the user prior to the new D.C. Rules, the same is specifically saved. In his submission, the society is deliberately, distorting the facts. He refers to a compilation tendered by the B.M.C. In addition, he relies upon the application made by his wife and him jointly on 24th February 1985. In his submission, on that date, D.C. Rules of 1978 were prevalent. He submits that on the ground

floor, clinics and nursing homes were permitted by B.M.C. He relies upon D.C. Rule No.7 and submits that it contemplates four uses/items. One of the user is clinic. He submits that it includes nursing home. He submits that the enactment insofar as registration of nursing home is concerned, it refers to the broad classification and, therefore, the term clinic as used in the D.C. Rules in question must include a nursing home. It has been so registered from 1979 to 1982. Dr.Shah sought to contend that the Corporation and the other parties were registering large number of nursing homes, whether public or private during the relevant period and, therefore, it was also understood by the B.M.C. that the term "clinic" would include nursing home.

30. Defendant No.2 then invited my attention to some documents from the compilation viz., Exh.38 and Notification or Circular at page 152.

He submits that Condition No.4 imposed under the aforesaid documents with regard to registration under the Nursing Home Registration Act is complied with and he invites my attention to the certificate in that behalf issued on 17th February 1985, page 141. He also invites my attention to circular at page 159 issued by the B.M.C. thereunder. The powers have been clearly delegated and it is not as if the Executive Engineer or Director (ESP) had no authority to grant permission to defendant No.2 for such user. Mr.Shah then invites my attention to page 162 of the compilation and submits that stringent of the conditions have to be applied and in the present case, as far as the old rules are concerned, the Regulation 7(iii) would hold field in the light of clarification/ circular dated 30th April 1985. He submits that thus there is nothing illegal in the defendant Nos. 2 and 3 utilising the flats for use as nursing home. Once the builder as well as B.M.C. has permitted such user and

admittedly, the same is commenced before registration of the Coop.Society in question, then, it is not open now to urge that the user is contrary to law, illegal and, therefore, deserves to be prohibited or stopped.

31. Mr.Shah made streneous attempt to distinguish the judgement of the Supreme Court in Dadar Avanti case. He submits that the relevant period as far as this case is concerned, is 1985 to 1987. He submits that judgement of the Supreme Court must been seen in the factual background in which the same came to be rendered. He submits that there was a user therein of second floor by the concerned member (Dr.Nerker). He submits that there was no completion certificate. Even the provisional occupation certificate was not granted. He submits that, that was the position on the date when Dr.Nerkar applied. He submits that when the notification dated 1st April 1985 is seen in the context of

these facts, it is clear that the Doctor occupying the second floor residential premises/ flat in the building Dadar Avanti could not have established or set up the nursing home. Another distinguishing feature, according to Mr.Shah is that in the case of Dadar Avanti, Society was already formed and in the case at hand when the defendant Nos. 2 and 3 applied, the society was not formed. That apart, defendant Nos. 2 and 3 had clearly intended to buy flats for use as nursing home as they had residential premises at Dadar. Mr.Shah was at pains to point out that section 4 of the Ownership Flats Act does not apply. Section 4 applies when construction is in progress. He submits that the conclusion of the City Civil Court and that of the Coop.Appellate Court is fair, just and proper.

32. Defendant Nos. 2 and 3 did not go as far as supporting the findings on the validity of Clause 12 of the Agreement. He submits that the

word "Void" must be corrected. However, conditions including clause 12 are capable of being relaxed by the builder. He submits that as far as opening three doors is concerned, no permission of the builder was required. Any door opening in the stilt or other portion of premises, then building permission is required and not otherwise. He submits that the petition and appeal are both filed malafide and with a view to harass the party in person and his wife. He submits that in addition to his oral submissions, the written statement before the trial court Exh.71 be also considered. He tenders a compilation and also relies upon the provisions of Maharashtra Ownership Flats Act and more particularly section 2(a) and section 4(A) thereof. He submits that the term nursing home is defined in Nursing Home Registration Act. He submits that the term Nursing Home as defined is synonymous to the word "clinic" appearing in D.C. Regulations. In any event, the registration

granted after inspection, under the Nursing Homes Act as also certificate granted on 17th April 1985 thereunder, has not been challenged by the society. In these circumstances, both in the appeal as well as in the petition no case is made out for interference by this Court and both may be dismissed with costs.

33. Mr.Anil Singh, appearing for Municipal Corporation invites my attention to issues framed by the civil court in the suit. He submits that the suit filed by the appellants herein was ex facie bad in law and not maintainable. He submits that no notice was given under section 527 of the B.M.C. Act. The suit must fail on that ground alone. He submits that it is not the case of parties before this Court and before the Courts below that section 527 of the B.M.C. Act is either not applicable or if applicable, the provisions thereof are ultra vires and of no legal effect. In any event, section 527 is not

violative of Article 14 of the Constitution. He submits that this point was raised in the written statement specifically and, therefore, non compliance with this statutory provision must entail in dismissal of the suit on that ground alone.

34. That apart, he submits that the suit was not maintainable because, as far as, the permission contemplated for user of the premises and/or change therein is concerned, the same is traceable to section 44 of M.R.T.P. Act. Grant of permission is contemplated by section 45 thereunder. Section 46 prescribes the period of validity of permission granted vide section 45. Section 47 provides for appeal in case a party is aggrieved by refusal of permission or conditional grant of permission. Appeal lies to the State Government. Thus, in this light that section 49 of M.R.T.P. Act must be seen and if so seen and considered, there is a finality attached to the

permissions granted under the M.R.T.P. Act. Consequently, no suit can lie to challenge the permission, in the City Civil Court, in the light of the prohibition contained in section 149. The trial court, therefore, had no jurisdiction to entertain and try the suit. Mr.Singh, submits that insofar as the permission in question is concerned, it is traceable to the then D.C. Rule 7(iii). Alternatively, it is traceable to Regulation 7(ix). He submits that in case it is contended that the concept of nursing home was not there at all and in any event, after deletion of the term "Group Medical Centre" from D.C. Rules, then Regulation 7(ix) contemplating permission as "Hospital" can always be resorted to. Mr.Singh submits that there is a power to delegate under the D.C. Rules as well as B.M.C. Act and M.R.T.P. Act. In these circumstances, defendant No.2 and 3 are right in their submission that their user was not prohibited. Mr.Singh adopts the submissions of defendant Nos.

2 and 3 in that behalf and invites my attention to the fact that prior to 1979 nursing homes were not there at all and still permissions were granted and which have been left undisturbed and unchallenged. In these circumstances, the judgement and decree of the trial court should not be interfered with and both appeal as well as writ petition be dismissed.

35. In the light of the oral and written arguments on record, the issue that arises for determination, in these proceedings, is whether the user of the premises by defendant Nos. 2 and 3 for nursing home is permitted by the agreement with the flat purchasers and under the D.C. Regulations for Greater Mumbai.

36. Any finding thereon would necessarily depend upon the applicability of the decision of the Supreme Court in the case of Dadar Avanti.

37. Before I proceed to render my findings and conclusions, it would be necessary to refer to some admitted facts.

38. From the record it is clear that the society has been formed by flat purchasers. The society is consisting of tenaments/ flats which are used as private residence. Clause 12 in the agreement for sale which has been entered into by the flat purchasers including defendant Nos. 2 and 3 reads thus:-

> "12. The flatholders shall not use the said premises for any purpose other than as a private residence (and the car parking space for parking a motor vehicle)"

39. In addition thereto, provisions of the Ownership Act do not in any manner state that the

stipulations therein are per se bad. On the other hand, section 4 of the Ownership Flats Act is noticed and the agreement and these provisions read together, it would be apparent that the same do not run counter to or affect the terms and conditions in the agreement for sale in any manner. The same read thus:-

> "4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered.
>
> "[(1)] Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats all or some of which are to be taken or are taken on ownership basis, shall, before, he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent, of the sale price enter into a written

agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under [the Registration Act, 1908 (hereinafter in this section referred to as "the Registration Act, 1908"] [and such agreement shall be in the prescribed form.]

"[(1A)] The Agreement to be prescribed under sub-section (1) shall contain inter alia the particulars as specified in clause (a); and to such agreement there shall be attached the copies of the documents specified in clause (b)-

(a) particulars -

(i) if the building is to be constructed, the liability of the promoter to construct it according to the plans and

specifications approved by the local authority where such approval is required under any law for the time being inforce;

(ii) the date by which the possession of the flat is to be handed over to the purchaser;

(iii) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(iv) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which instalments thereof may be paid;

(v) the precise nature of the

organisation to be constituted of the persons who have taken or are to take the flats;

(vi) the nature, extent and description of common areas and facilities;

(vii) the nature, extent and description of limited common areas and facilities, if any;

(viii) percentage of undivided interest in the common areas and facilities appertaining to the flat agreed to be sold;

(ix) statement of the use for which the flat is intended and restriction on its use, if any;

(x) percentage of undivided interests in

the limited common areas and facilities, if any, appertaining to the flat agreed to be sold;

(b) copies of documents,-

(i) the certificate by an Attorney-at-law or Advocate under clause(a) of sub-section (2) of section 3;

(ii) Property Card or extract of Village Forms VI or VII and XII or any other relevant revenue record showing the nature of the title of the promoter to the land on which the flats are constructed or are to be constructed;

(iii) the plans and

specifications of the flat as approved by the concerned local authority]

40. Assuming that above provision so also provisions of the Ownership Flats Act would have to be read in context and along with M.R.T.P. Act and B.M.C. Act as also D.C. Regulations, even then, the issue is whether in residential building non residential user (nursing home) of the nature commenced and continued by defendant Nos. 2 and 3 is permissible or not? In other words, whether the non residential user (nursing home) is permitted by the D.C. Rules, then prevailing. It is well settled that the D.C. Regulations are traceable and form part and parcel of Development Plan. (see section 22(m) of M.R.T.P.Act). As far as D.C. Regulations at the relevant time are concerned, the same read thus:-

> "Development Control Rules - Greater Bombay (As modified and sactioned by Governement of Maharashtra) (as amended upto 1-8-1978 with subsequent modifications as appendices) printed at Municipal Printing Press, Bombay"

As far as D.C. Rules are concerned, they are for greater Bombay. Part I deals with permissions and zones. Rule 4 deals with use as specifically designated on development plan. If use of a site is specificaly designated on the D.P. then it shall be used only for the said purpose. Rule 4(a) and (b) read together with (c) provides that when use of the site is specifically designated on the development plan, it shall be used for the purpose so designated. When the use of building/ premises is not specifically designated on the development plan, it shall be in conformity with the zone in which they fall. Rule 5 provide for

zone or districts. It reads thus:-

> "5. Zones or districts :- For the purpose of the development plan and these rules Greater Bombay has been divided into the following classes or zones :-
>
> 1. (a) Residential
>
> (b) Residential with shop lines along streets;
>
> 2. Commercial
> 3. Industrial
> (a) General, (b) Special and
>
> 4. Green or No Development Zones.

41. Part II deals with residential zone. Rule 7 therein deals with rules in residential zones. Rule 7 insofar as it is relevant

for these matters reads thus:-

> "7. Use provision in Residential Zones- In residential zones building or premises shall be used only for the following purposes and their accessory uses -
>
> (i) Any residences :
> (ii) Customary home occupations.
> (iii) Medical and dental practitioners, clinics and dispensaries and group Medical Centres.
>
> iv) Professional offices and studies of a resident of the premises and incidental to such residential use, not occupying a floor area exceeding 200 sq.ft.
>
> v) Residential hotels or lodging houses in independent buildings or parts of buildings or on separate floors thereof

with the special written permission of the Commissioner, who will take into consideration suitability of the site, size and shape of the plot, means of access, water and sanitary arrangements etc. before granting the permission.

vi) Education Buildings including hostels, religious Buildings, community halls and welfare centres and gymnasiums, except trade Schools.

Provided that the Municipal Commissioner may be order in writing direct that the montessory schools, Kindergarden Classes or Bal Mandirs in a part of any residential building maybe conducted preferably on the ground floor, if the area thereof is not less than 37.16 sq. mt. (400 square feet); and on condition that no nuisance is likely to be caused

to the residents of the Buildings.

(ix) Correctional or mental institutions, institutions for the children, the aged or widows, sanitoria and hospitals (except veterinary hospitals) with the special written permission of the Commissioner provided that those principally for contagious, disease, the insane or for correctional purpose shall be located not less than 150 ft. from any adjoining premises.

(x) Research, experimental and testing laboratories not involving any danger of fire or explosion nor of any obnoxious nature and located on a site not less than 10 acres in area and when the laboratory is kept at least 100 ft. from any of the boundaries of the site and the accessory residential buildings 100 ft.

from the laboratory".

42. The argument before me is that stipulations in the agreement for sale apart, if the building or premises fall in a residential zone and in such zone, if premises can be used by Medical and Dental Practioners, or as clinics and dispensaries, then, merely because the flats are situate in residential building does not mean that the activity of defendant Nos. 2 and 3 is per se illegal.

43. For me, it is not necessary to go into the other submissios as to whether clinic would include nursing home or not and what is the effect of the deletion of the term Group Medical Centres from the D.C. Rule No.7(iii). In my view, such submissions and arguments are not open after the Supreme Court decision in the case of Dadar Avanti. For that purpose, it is necessary to refer to the judgement of the Supreme Court in

Dadar Avanti Coop.Socy. Vs. MCGB and ors. rendered on 9th February 1996 in Civil Appeal No.3239 of 1996. This civil appeal arose from a judgement and order of this Court dated 14th September 1994 in W.P.826 of 1988.

44. This petition was filed by the appellants before the Supreme Court. The dispute in the petition as well as the issue before the Supreme Court was whether Municipal Authorities could have permitted the respondent Nos. 3 and 4 before the Supreme Court (Dr.Nerkar and his wife), to convert their flats on the second floor of the building from residential purpose to that of a commercial one for opening of a surgical nursing home.

45. The appellant Coop.Society consisted of members who purchased flats in the building Dadar Avanti. The building was constructed by one M/s.Amar Builders. They submitted a plan on 25th

July 1979 for construction of ground plus 13 floors in Dadar area. The plan which was approved by the Corporation indicated that the ground floor was to be used for clinics and garages while the upper floors will be used for residential purpose. Dr.Nerkar, a medical practioner purchased flat Nos. 3 and 4 on the 2nd floor. The grievance of the society and its members was that Dr.Nerkar converted the flats on the second floor for surgical nursing home and thereby violated not only the terms and conditions in the sanctioned plan but also created a situation where a surgical nursing home in a residential building became hazardous to people at large.

46. The dispute with the B.M.C. raised by the society was to the user by the Doctor - a medical practitioner of flat Nos. 3 and 4 of the second floor as surgical nursing home. The occupation certificate was applied for the entire

building except flat Nos. 3 and 4 on the second floor. The Corporation granted provisional occupation certificate on 14th January 1987 for the entire buildihg except these flats.

47. The members/ medical practitioners named above, applied to the Municipal Corporation seeking its permission for change of user of the flat from residential to commercial. The society and its members objected to grant of such permission. The Ex.Engineer Building Proposals (City) vide his order dated 20th April 1987 rejected the application of the members/ medical practitioners on the ground that the proposal was not in conformity with the existing D.C.Rules. Against the order of the Ex.Engineer, a representation was made by the member/ medical practitioner to the Commissioner, B.M.C., who by his order dated 31st July 1987 reversed the order of Ex.Engineer and granted no objection certificate for change of user of the flats. The

society moved this Court challenging the order of Municipal Commissioner. The first writ petition was allowed by this Court on the ground that the Commissioner did not hear the society before granting permission. The matter was thus remanded to the Commissioner. Once again by his final order dated 18th December 1987, he confirmed that the user of both flats as surgical clinic is in conformity with the existing D.C. Rules and building by-laws applicable to Greater Mumbai. He also held that the occupants of the building were aware of the fact that these flats were intended to be used for running a surgical clinic. With these observations, he permitted change of user. The society challenged this order by the second writ petition, in which the judgement, impugned and challenged before the Supreme Court was delivered by this Court.

48. After noticing the contentions and more specifically the contention that in the year 1987

at which point of time the order was passed under the building regulations, it was not permissible to apply and to grant change of user of the nature claimed by the medical practitioner, It was held by the Supreme Court that this Court had erred in law in granting such permission merely on the ground that such permission could have been granted originally when the plan for building was sanctioned. It was also contended that the allottee cannot claim substantive right of change of user and when such is an application made, the relevant regulation in force must be adhered to by the authority while considering such application. The submissions have been noted in para 3 of the judgement and the Supreme Court in paras 4 and 5 has observed thus:-

> "4. The Act is intended to make provisions for planning the development and use of land and to ensure that Town Planning Schemes are made in a proper

manner and their execution is made effective. In a city like Bombay where there is acute dearth of vacant sites and where there is rapid increase of population, unless developmental authorities are conferred with power to regulate constructions of buildings and unless development takes place in a planned manner it will be hazardous for a healthy living. With this end in view the Act has been enacted constituting Regional Planning Boards and providing for development plans by a Development Authority. The Act also provides the procedure to be followed in preparing and sanctioning development plans and it also provides for control of development and use of land included in the development plans. The Act confers power on the Planning Authority to take such remedial measure if it comes to its notice that

there has been unauthoised development. The Planning Authority has also the power to require removal of authorised development or use if the authority thinks it expedient in the interest of proper planning and its area. Such drastic power has been conferred on the authority with the obvious object that the said authority would act in a manner which is not detrimental to the human health and the unauthorised development or user of the land should be prohibited from such user so that there would be development of the city in a planned manner. If such unauthorised user of the land is not checked by such planning Authority then in cities like Bombay where the growth rate of inhabitant is fast it would be difficult to have a comfortable living.

"5. Before we focus our attention on the different provisions of the Act it would be appropriate to notice the admitted facts, namely, the builder submitted the plan of the building in July 1979 which was approved by the Corporation. The approved plan indicated that onlythe ground floor would be used for clinics and garages and rest of the floors would be used for residential purposes. The architect of the building even when applied for "Occupation Certificate" in September 1986 he did not make an application for Flats Nos. 3 and 4 on the second floor as the allottees were insisting on using the same as clinic whichwas contrary to the sacntioned plan. Respondents 3 and 4 made an application in April 1987 seeking change of user of the plots".

49. When the attention of the Supreme Court was invited to the fact that in subsequent D.C. Regulation viz., Regulations of 1991 which have come into force with effect from 25th March 1991, clinics are permitted in residential areas upto second floor with a condition that there should be separate access, the Supreme Court has observed:-

> "23. In course of hearing it was also pointed out to us by the counsel appearing for the Development Authority that in the subsequent Regulation of 1991 (Development Control Regulation for Greater Bombay, 1991) which has come into force with effect from 25/3/1991 clinics are permissible in residential areas upto second floor with the condition that there should be a separate access. The High Court while dismissing the writ applications has taken that into

consideration and has found that there has been no error in granting permission in the order of the Commissioner. It is to be noted that the order of the Additional Commissioner is dated 18/12/1987, allowing such change of user of the flats from residential to surgical clinic and the Regulation of 1991 came into force with effect from 25/3/1991 and, therefore, the said regulation could not have been pressed into service for deciding the legality of the order of the Additional Commissioner. In the aforesaid premises we hold that the Additional Commissioner had no power to allow the change of user sought for by respondents 3 and 4 and the High Court also committed error in upholding the said order. We accordingly, set aside the order of the Additional Commissioner as well as the High Court and allow this

> appeal. Needless to mention that since the Regulation of 1991 empowers the authority concerned to allow change of user it would be open for the respondents to move the authority afresh and the said authority may pass appropriate orders in accordance with the Regulations of 1991 which is said to be in force. This appeal is allowed."

50. From a reading of these observations, conclusions and findings of the Supreme Court, it is clear that the Supreme Court has clearly held that when the application was made for change of user under the regulation in force, it was not permissible to allow change of user from residential to commercial, though at a later point of time, the regulation is changed and such permission can be accorded, subject to certain terms and conditions. The Supreme Court, therefore, held that the new D.C. Rules cannot

be of any assistance and once the D.C. Rules, then in force, did not permit change of user from residential to commercial, then no permission as claimed by medical practitioner could have been granted.

51. It is not possible for me to accept the contentions of defendants that this judgement will have no application to the facts and circumstances of the present case. With greatest respect, it is not possible to accept the submission that attention of the Supreme Court was not invited to the Regulation which was prevailing on the date when the construction before it was commenced or when it granted provisional occupation certificate. It is impossible to accede to the submission that when Dr.Nerkar applied for change of user the regulations which are now brought to my notice were in force. A Supreme Court decision cannot be held to be not binding on the ground that some

fact was not brought to its notice or that some submission, although, canvassed, was not considered by the Supreme Court. With regard to the binding nature of the Supreme Court decision, the mandate flows not only from Article 141 of the Constitution but also from judicial discipline which requires that a decision of the Superior Court does not lose its binding effect as far as the Court subordinate to it, merely because, some facts allegedly escaped its attention. This aspect has been succinctly summarised in a recent decision of the Supreme Court in Director of Settlements, A.P. and others, vs. M.R. Apparao and another reported in A.I.R.2002 S.C. 1598 where the Supreme Court has observed thus:-

> "7. So for as the first question is concerned, Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court

shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ration of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ration and not any particular word or sentence. To determine whether a decision has declared law' it cannot be said to be law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the

Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An ’obiter dictum’ as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as torequire a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided bythe Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make

any pronouncement on points not directlyraised for its decision. The decision in a judgment of the Supreme Court canot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (See AIR 1970 SC 1002 and AIR 1973 SC 794). When Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which hadbeen set aside bythe Supreme Court is a nullity. (See 1984(2) SCC 402 and 1984(2) SCC 324). We have to answer the first question bearing in mind the aforesaid guiding principles. We may refer to some of the decisions

cited by Mr. Rao in elaborating his arguments contending that the judgment of this Court dated 6th February, 1986 cannot be held to be law ceclared bythe Court within the ambit of Article 141 of the Constitution. Mr. Rao relied upon the judgment of this Court in the case of Pandit M.S.M. Sharma v. Shri. Sri Krishna Sinha and others, 1959 Supl (1) SCR 806, wherein the power and privilege of the State Legislature and the fundamental right of freedom of speech and expression including the freedom of the press was the subject matter of consideration. In the aforesaid judgment it has been observed by the Court that the decision inGunupati Keshavram Reddy v. Nafisul Hasan, AIR 1954 SC 636, relied upon by the counsel for the petitioner which entirely proceeded on a concession of the counsel cannot be

regarded as a considered opinion on the subject. There is no dispute with the aforesaid proposition of law".

52. In the case at hand, as far as cooperative Court is concerned it had no occasion to have a look at the decision of the Supreme Court. However, while trying the suit, the Civil Court had definitely before it the same. The Civil Court refers to this judgement in paras 38 and 39 of its judgement and order and observes as under:-

"38. Learned Advocate Mr.V.V.Pai for the plaintiffs submitted that the Hon’ble Supreme Court held in the case of Dadar Avanti CHS Ltd. Vs. B.M.C. (Civil Appeal No.3239 of 1996 @ SLP (Civil) No.18187 of 1995 dtd. 9/2/1996) that the definitions of building operation in

Sec.2(5), development in Sec.2(7) and land in Sec.2(14) make it very especially clear that the building or part of building, if it has been sanctioned for specific purpose the user of the same for any other purpose unless permitted by Competent Authorities would be in contravention of provision of Act. The Hon'ble Supreme Court found in that case that under sanctioned plan only the ground floor was permitted to be used as commercial purpose and the Architect had applied for completion certificate only in respect of other flats and shop premises except flat Nos. 3 and 4 allotted to the respondents since they wanted to use the same for commercial purpose though under sanctioned plan only ground floor has been permitted to be used as commercial purpose. The Apex Court was not called upon to decide

whether the Nursing home was included in the definition of clinic and therefore, that point has not been commented upon or touched by the Hon'ble Supreme Court but relying on the Oxford Dictionary meaning and the judgement of our Hon'ble High Court delivered in O.A. No.3239 of 1996, I am of the view that the facts of Dadar Avanti case were different. Hence, the ratio of the Hon'ble Supreme Court delivered in that case is not applicable to the facts and circumstances of our case.

39. It was contended before the Hon'ble Supreme Court that when Application for change of user was made in 1987 under Regulation in force it was not permissible for allowing the change of user from residential to commercial through at a later point of time the

Regulation had been changed and such permission could be accorded subject to certain terms and conditions which include requirement of making an independent access to the building. The Hon'ble Supreme Court turned down the said plea of Respondent nos. 3 & 4 that they could seek change of user in 1987 for the flats they occupied on second floor. The ratio of this case is not applicable to the facts and circumstances of our case. In our case the Gladhurst building was constructed by builder Defendant No. 1 for residential purpose and in terms of Development Control Rules in force since 7-1-1967 Regulation 7(iii) permitted any residential zone's building to be used for medical or dental practitioner's clinic and dispensary and group medical centre and the permission of change of user granted by BMC is in

respect of ground floor flats of Defendant no. 2 and 3 and not flats which were on the second floor. So on ground floor the permission to run the clinic or nursing home was permissible in terms of Regulation 7(iii) of Development Control Rules framed by the Government for Greater Bombay. So the facts of Dadar Avanti case are different from the fact obtainable in our suit and therefore, this ruling is not applicable to the facts and circumstances of our case. In our case the BMC rightly granted the permission to the Defendant nos. 2 and 3 after considering all the aspects of the matter and after considering the No Objection given by the Defendant no. 1 Builder, the owner of the Building and the Rules and Regulations in force at that time.

53. In my view, the learned Judge could not have distinguished the judgement of the Supreme Court by observing as above. The Supreme Court had before it the factual aspects in toto. It was not the case of B.M.C. also before this Court as also the Supreme Court that at the relevant time, the D.C. Regulations permitted the user contemplated, proposed, commenced or continued by Dr.Nerkar. Unlike the stand taken in the written statement in the suit, before the Supreme Court, the Corporation did not urge that the Rule 7(iii) would cover the usage as surgical nursing home. In fact, the stand taken was as recorded by the Supreme Court in para 3 viz., that when the plan was originally sanctioned, the change from residential to commercial was permitted. Therefore, it is futile to urge and observe as well that this decision of the Supreme Court would not apply to the case at hand. The finding of the trial court that the building before it, was constructed for residential

purpose and the D.C. Rules in force on 7th January 1967 permitting the user as above or the permission could have been granted in respect of ground floor flats, is not at all sustainable.

54. In the present case, the Civil Court has observed very clearly that Flat Nos. B-1 and B-2 are situate on the ground floor and the then D.C. Rules make a distinction between ground floor and upper floors. The D.C. Regulations placed before me, more particularly Regulation No.7(iii) do not state in any manner that a medical and dental practitioner’s clinic and dispensary can be set up in premises in residential zone provided they are situated on the ground floor. The distinction that is made by the learned Judge of the City Civil Court is not permissible in the light of phraseology of Regulation 7 reproduced above. Therefore, in my view, the location of the flats is no ground for distinguishing the binding judgement of the Supreme Court.

Therefore, the finding that on the ground floor nursing home was permissible is of no use to distinguish the judgement of Supreme Court. Before the Supreme Court, the sanctioned plan showed this user. Before me, that is also not the position. If sanctioned plan had permitted such user, then it was not necessary to apply to the Builder and to Corporation under Rule 7 of D.C. Rules. The Builder's affidavit belies this position. The other finding that B.M.C. has rightly granted the permission and after considering no objection by the builder, is also of no assistance. Firstly, in the very same para, where the judgement of the Supreme Court has been distinguished by the learned Judge of the Civil Court, there is no occasion to observe that B.M.C. permission was granted after considering NOC by the builder and that it has been so granted by considering other aspects as well. If this is the observation made, then, it is clear that the learned Judge was aware that he

could not have brushed aside the binding judgement.

55. In my view, therefore, the controversy is fully covered by the decision of the Supreme Court. The Supreme Court had on facts clearly observed that the plan of building before the Supreme Court, approved by the Corporation, allowed ground floor to be used for clinics and garages and upper floors to be used for residential purposes but by this it cannot be said that the D.C. Rules then prevailing permitted any commercial activity or activity of the nature commenced by defendant Nos. 2 and 3 on the ground floor of the residential building. In fact, no attempt was made by the Corporation to justify this finding of the City Civil Court.

56. It is only a faint attempt by party in person to justify the said finding and for that purpose he places reliance upon certain

notifications.

57. The applications made on 24th January 1985 by defendant Nos. 2 and 3 are for approval of change of user of the ground floor flats from residential to nursing home for medical dispensary and clinic as permitted under section 7(3) of Part II of D.C. Rules. To these applications, what was enclosed was the plan of the ground floor flats, agreement dated 10th January 1985, its registration details and the letter of Builder (defendant No.1) dated 11th January 1985. The letter of builder is eloquent enough because, the no objection granted by the builder is conditional viz., on obtaining permission from Corporation. On the applications made by defendant Nos. 2 and 3, 4th defendant through its officers makes the endorsement that there is existing ground plus six floor building. The permission sought by the Architect is for change of user of two flats on the ground floor.

Flat B-1 abuts 40 feet wide road whereas Flat B-2 is behind stilt. Upon charging some premium, permission could be granted is the endorsement. Premium has been paid. On 5th March 1985 Corporation grants permission subject to the conditions enlisted therein. Defendant Nos. 2 and 3's Architect addressed compliance letter on 8th May 1985. Similar is the correspondence with regard to other flat i.e. Flat No.B-2.

58. It appears that the matter was thereafter again examined by the Law Officer of B.M.C. and the decision was taken that permission to register nursing home would always be without prejudice to the rights of B.M.C. to take action under the D.C. Rules. The Law Officer of Corporation advised that change of user is not done and the requirements under the Bombay Nursing Home Registration Act and Rules thereunder are fulfilled. The registration granted after affixing rubber stamp on the format

which was given below this letter.

59. I find nothing in the Circulars dated 29th April 1985 and 26th April 1985 by which it could be said that the decision of Supreme Court (Supra) would not apply.

60. It is also necessary to refer to the deposition of defendant No.2 in the Civil suit recorded on 29th March 2001. He produced all the above documents and in the cross examination in para 4 this is what is stated:-

> "The changes for my flats B-1 and B-2 are shown in the approved plan in Ex. 5 colly. Builder has not given any plan for the change of user of flat No. B-1 and B-2. Builder had permitted me to put three separate doors as per Ex.-9. Ex-5 Plan relates in respect of construction of three doors. Ex. 9 letter issued by

builder is pertaining to permission granted for the construction of three doors. Plan annexed to Ex.9 is the same plan given by builder to me. There is no signature of the builder on the said plan annexed to Ex.9".

".....I do not have the copy of the application filed by me through Architect to BMC, for approval of Plan Ex.9".

".....It is not true that defendant no. 1 builder has not given a permission to open the door on the stilt portion i.e. towards East side of flat No. B-1. Doors are shown in Plan Ex. 5. There is no door to labour room. Ex.6 has been issued on 17/4/1985".

"..... I applied to the builder to issue me the permission for the change in

> user. I do not have the copy of the letter in the Court. I applied to the builder as per the terms I purchased flats for Nursing Home and I intended to give this letter to the Corporation and the Bank. Rs.8200/- payment was made to the Corporation for staircase premium on 27/5/1985 i.e. as per Ex.10 colly".
>
> ".... I have obtained the permission of change of user of my both flats".

61. The Corporation’s witness in the cross examination states as under:-

> ".... Permission for change of user is granted under Sec. 342 of BMC Act. Taking into consideration the development Control Rooms in force in 1985, permissions seem to have been granted. I

have put in more than 11 years service in BMC. This was residential zone. As per rules and regulations in force in 1985, and even till today in residential zone, permission can be granted for Nursing Home. It is the special permission granted by BMC. I cannot tell as per record what which regulations in force governing such matter".

".....The development control rules quoted in the plaint at pages 7 and 8 are not known to me".

".....It is not true to say that we had granted permission for alteration, additions and change of users to Mr.B.M. Shah and his wife by overlooking the then rules and regulations in force".

62. Thus, above mentioned documents and the

circulars do not support the case that building regulations, then in force, permitted change of user from residential to commercial. It is only by relying upon the abovementioned regulations that the permission is sought to be justified, but as observed by me, one cannot conclude that the attention of Supreme Court was not invited to all these aspects and that the Supreme Court decision is in ignorance of the D.C. Rules, then in force. State of evidence being what it is, it is not safe to conclude that the regulations which are now placed before me were the one relied upon by the Corporation. In any event, the Supreme Court having observed that no change from residential to commercial/ non residential was permissible, then, no reliance can be placed on the above documents. As to whether Corporation permitted user of ground floor premises for non-residential purpose in a residential zone, nothing has been brought on record. That is not

even the case of Corporation in the deposition Therefore, the distinction sought to be made by the party in person on the basis that before the Supreme Court, second floor premises were involved whereas ground floor premises can always be utilised for commercial/ non residential use, is baseless.

63. Thus, the conclusion reached by the Courts below is contrary to the materials produced before them. The Supreme Court decision is bindidng on them. That apart, the basis of distinguishing it is not sound at all. Even the Regulations produced before me do not support the stand of defendants 2 and 3 as well as B.M.C. The evidence to substantiate the pleas in their written statement is not reliable and trustworthy at all. The admissions therein are fatal to their case. Therefore, the attempt to justify their actions must fail. As observed above, in these state of affairs, it is not necessary to go

into other issues and decide other contentions. Assuming that clause 12 of the Agreement must be read in the light of D.C.Rules then prevailing, even then, the permission granted by B.M.C. must fail once the Rules do not contemplate any change of user as held by the Supreme Court. Further attempt to point out that relevant D.C. Rules were not perused and interpreted by the Supreme Court also fails for reasons recorded above.

64. In the light of above findings, it is not necessary to decide whether the term "Clinic" would include "Nursing Home" or not. In any event, that plea is not open after the Supreme Court decision.

65. To conclude, the judgement under appeal rendered by the City Civil Court, therefore, is erroneous and unsustainable. The same is, therefore, quashed and set aside. First Appeal No.129 of 2003 is allowed and a permanent

injunction shall issue restraining defendant Nos. 2 and 3 from using or continuing the use of Flat No.B-1 and B-2 situate in Gladhurst Building for non-residential purpose unless they obtain fresh permission from B.M.C. by invoking D.C.Rules 1991 as amended till date. Same conclusion to follow with regard to the judgement of the Coop.Appellate Court. The same also stands quashed and set aside. Rule is made absolute accordingly.

66. However, as observed by the Supreme Court, if continuance of the user by Defendant Nos. 2 and 3 is permissible under the D.C. Rules now in force, then, it is always open for defendant Nos. 2 and 3 to apply for such permission or continuation. Any application, if made, in that behalf would be considered in the light of the regulations prevailing now and should be dealt with in accordance with law.

67. As far as C.R.A. No.273 of 2003 is concerned, the grievance of party in person is that some remarks have been made against him in the judgement under appeal and more particularly in para 52 thereof, while disposing of chamber summons No.1105 of 2000. His grievance is that the action of taking out chamber summons was justified. In any event, remarks should not have been made against him and they were not called for at all.

68. Since I have just now decided the wider controversy and the arguments were confined before me to the same, in my view, it is not necessary to take cognisance of the grievance made in chamber summons No.1105 of 2000 which is taken out by defendant No.2. The order of the learned trial Judge not inclined to take action on this chamber summons and dismissing it is sustained. However, considering the fact that the defendant No.2 was appearing in person, he

had to take time and effort to prepare himself and he was required to attend court on several dates so also he being a senior citizen, the remarks made by the trial Judge are expunged. C.R.A. disposed of accordingly.

69. As far as Contempt Petition No.176 of 1989 is concerned, considering the averments therein and the reply filed to the same, in my view, the remedy of the party-in-person was not to invoke the contempt jurisdiction of this Court but to take out appropriate proceedings, if in his submission, there is obstruction to his carrying on the activities. In any event, since the judgement under appeal is set aside, the F.A. is allowed so also the petition and permission is granted to defendant No.2 to apply to B.M.C. in the light of D.C. Regulations now prevailing, it will not be necessary to enter into earlier controversy. Needless to state that upon permissions being granted under the D.C.

Regulations now in force, it would be open for defendant No.2 and 3 to carry on their non-residential activities but since injunction is granted by me and the order under appeal is set aside, there is no need to entertain the grievance of petitioner with regard to breach of interim orders passed by this Court. Even otherwise that is an aspect which cannot be properly decided on affidavit. In my view, there is substance in the contention that the averments in the contempt petition do not enlist specific acts of violation or breach of interim orders.

70. In the circumstances, there will be no order on the contempt petition. It is dismissed with no order as to costs.

71. In view of disposal of Writ Petition Civil Application No. 2356 of 2004 taken out by respondent in Writ Petition 1812 of 1987 is disposed of. Similarly Civil Application No.

828 of 1990 taken out by respondent in Writ Petition 1812 of 1987 does not survive and the same is disposed of accordingly. In view of disposal of first appeal No. 129 of 2003, Civil Application No. 1034 of 2005 does not survive and the same is disposed of accordingly.

(S.C.DHARMADHIKARI, J)